IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No: DA-17-0020

DENICE A. STOKKE,

Plaintiff/Appellant,

V.

AMERICAN COLLOID COMPANY, a Delaware Corporation; G.K. CONSTRUCTION, INC., a Wyoming Corporation; and JOHN DOES I-III,

Defendants/Appellees

APPELLEE AMERICAN COLLOID COMPANY'S ANSWER BRIEF

On Appeal from the
Montana Twenty-Second Judicial District Court, Carbon County
Cause No. DV-15-68
The Honorable Blair Jones, District Court Judge

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I. STATEMENT OF THE ISSUES

A. Whether the district court correctly applied the rule of owner-independent contractor liability to the case, rather than the rule of premises liability.

B. Whether the district court correctly declined to apply an exception to the general rule that American Colloid, as an owner/general contractor, did not owe Stokke, the employee of a subcontractor, a duty of care.

II. STATEMENT OF THE CASE

This appeal concerns the application of the common law rule that general contractors are not liable to the employees of their subcontractor, absent an applicable exception. American Colloid Company ("American Colloid"), owns and operates a bentonite mine, and entered into a contract with 4N Trucking, Inc. for the provision of certain services, including hauling bentonite and maintaining the haul roads. 4N Trucking's employee, Denise Stokke, was allegedly injured in the process of crossing a walkway to access a well to fill her water truck so she could apply the water to the haul roads for purpose of dust abatement.

Stokke filed suit against American Colloid, alleging it was liable for her injuries as the owner and operator of the bentonite mine. After the exchange of written discovery and numerous depositions, American Colloid filed two separate motions for summary judgment. The first motion sought summary judgment on

the basis that American Colloid owed no duty of care to Stokke under the rule that general contractors are not liable to the employees of their subcontractor, absent an applicable exception. The second motion for summary judgment argued that no liability could be imposed under Montana's premises liability scheme.

The district court granted American Colloid's motion for summary judgment on the duty issue, and held that because American Colloid did not owe Stokke any legal duty of care, that it need not address the separate motion with respect to liability under a premises liability theory. The district court dismissed each of Stokke's claims against American Colloid, and this appeal followed.

III. STATEMENT OF THE FACTS

American Colloid operates an open cut bentonite mine on the Montana/Wyoming border. CR 1, ¶¶ 9-10. American Colloid contracted with GK Construction to perform the actual bentonite mining, which includes stripping and storage of soils, mining, loading, and reclamation. CR 1, ¶ 13. American Colloid separately contracted with 4N Trucking, Inc. to haul bentonite from the mine to the plant located some distance away from the physical mining, and to perform road maintenance, which included the application of water to the haul roads when necessary to mitigate dust. CR 56, Exh. A; CR 54, Exh. B; CR 54, Exh. A, 13:16-25, 24:1-7, and 68:6-8.

Denise Stokke was an employee of 4N Trucking at all times germane to this action. CR 54, Exh. A, 14:15-20. Stokke was tasked with driving a water truck and watering the roads. CR 56, Exh. B, 83:11-84:1. From April 2012 through September 24, 2012, Stokke accessed a well to fill her water truck by the exact same means hundreds of times prior to her fall, which included walking across a wood walkway to turn on the water, walking back across the access to her truck to open the valve, and then reversing the process to turn off the water. CR 56, Ex. C; Photographs (Exh. A). In all, Stokke used the access to the well four times per load of water. CR 56, Exh. B, 122:18-123:4.

From the first time Stokke used the walkway to get to the well, she recognized the condition of the access. CR 56, Exh. B, 130:7-131:4. A slight ditch ran along one side of the well access, which could be stepped across or into to access the well as an alternative to using the walkway. CR 54, Exh. A, 18:3-10. No special equipment was used to cross the walkway at issue. CR 54, Exh. D, 127:14-8. Stokke knew the 2x4's used as the access walkway were loose, and were not tied together. CR 56, Exh. B, 130:7-131:4. On the first day she used the access she allegedly told her supervisor at 4N Trucking that the access appeared "unsafe" to her. CR 56, Exh. B, 130:7-131:4. However, Stokke did not report the condition to anyone at American Colloid, did not demand improvements be made

to the access, and did nothing herself in the months leading up to her fall to improve the access. CR 56, Exh. B, 130:7-131:4.

On September 24, 2012, Stokke reached the well for her first load of water at approximately 2:30 a.m. CR 56, Exh. B, 105:2-7. She safely accessed the well the same way she had done numerous times prior to that date. In the process of returning to her truck, Stokke fell after one of the boards used for the crossing allegedly twisted, causing her to lose her balance. CR 56, Exh. B, 108:18-109:1. After her fall, Stokke continued to use the access for the next two days which amounted to approximately sixty trips across the access. CR 56, Exh. B, 122:18-123:4. Stokke did not fall and was able to use the access without incident for the approximately sixty subsequent trips across the access. CR 56, Exh. B, 122:18-123:4.

Stokke did not report the fall to anyone at American Colloid. From the time the well was in use in 2005 to the time prior to Stokke's fall on September 24, 2012, no one at 4N Trucking or American Colloid was aware of any other falls or injuries at the access or that the access was in an unsafe condition. CR 56, Exh. D, 27:24-28:19; CR 56, Exh. F, 45:18-22.

American Colloid did not control the manner in which 4N Trucking performed its work, and 4N Trucking's maintenance of the road dust was done

under its own direction. CR 54, Exh. A, 24:14-20 and 100:13-24. 4N Trucking also had sole discretion in how to access the water wells used in its operations. CR 54, Exh. A, 26:9-21, 98:11-15, and 100:13-24. American Colloid maintained no control over 4N Trucking or its employees in accomplishing their duties. CR 54, Exh. A, 75:11-18 and 98:22-99:10. American Colloid did not direct or supervise 4N Trucking's choice of which well to use or how it was to be accessed. CR 54, Exh. A, 100:19-101:3. The contract language between American Colloid and 4N Trucking Agreement provided that 4N Trucking would be "responsible for the performance of all work undertaken and for the accomplishment of the desired result, and ACC shall have no control over the method and means of such accomplishment. . ." CR 54, Exh. B, 5-6.

Under its contract with American Colloid, 4N Trucking also procured its own Mine Safety and Health Administration ("MSHA") identification number which required it to have its own training plan and to train its own employees regarding MSHA regulations. CR 54, Exh. A, 27:11-28:3. The only training American Colloid engaged in with 4N Trucking employees was "site specific" training relative to the bentonite plant located several miles from the well at issue. CR 54, Exh. D, 134:19-22; CR 54, Exh. A, 28:17-29:9.

American Colloid's employees did not have any responsibility for

maintenance, access, or use of the wells in connection with the area at issue, as that was handled by 4N Trucking. CR 54, Exh. C; CR 54, Exh. A, 47:10-48:5 and 82:23-83:13. Individuals using, accessing, or providing maintenance for the wells were all employed by 4N Trucking, which also determined which wells to use when maintaining the roadways. CR 54, Exh. C; CR 54, Exh. A, 24:14-20, 47:10-48:5 and 98:11-15; CR 54, Exh. B. 4N Trucking provided all necessary repairs to the well, including fixing couplings, replacing hoses, and maintaining the area around the well in order for 4N Trucking to perform its work. CR 54, Exh. A, 47:10-48:5. American Colloid did not perform any maintenance on the well. CR 54, Exh. A, 101:23-102:21. Additionally, 4N Trucking would not allow other individuals or entities to water the roads who did not contract with 4N Trucking. CR 54, Exh. A, 64:10-13. If access to the well was blocked, 4N Trucking had the power to remove such impediment. CR 54, Exh. A, 99:17-22.

If 4N Trucking had a safety concern over accessing the well, it would have fixed the access to make it safe itself. CR 54, Exh. A, 22:20-23:6. American Colloid would not have prevented 4N Trucking from making such changes. CR 54, Exh. A, 23:15-18. No one from 4N Trucking had expressed safety concerns over the access; however, if 4N Trucking was concerned over access it would have taken action on its own behalf. CR 54, Exh. A, 45:18-22. No one from 4N

Trucking, at any point in time, from when it began taking water from the well in 2005 to the time of Stokke's fall, made ACC aware of any hazardous conditions or dangers on or around the well. CR 54, Exh. F, 73:11-16.

Stokke's supervisors were both 4N Trucking employees. CR 54, Exh. D, 125:6-10. If she had a question or issue with her work, she understood she was to take it to 4N Trucking. CR 54, Exh. D, 125:11-13. She was paid by 4N Trucking and they had the power and authority to retrain, reprimand, or fire Plaintiff, if necessary. CR 54, Exh. D, 125:14-20. Stokke's interaction with American Colloid was extremely limited. She did not know any of American Colloid's supervisors or management, and never interacted with anyone from American Colloid in her nine months on the job. CR 54, Exh. D, 134:15-18. No one from American Colloid supervised Stokke, nor did American Colloid provide her with any safety equipment. CR 54, Exh. D, 135:18-24. Stokke was not trained by anyone from American Colloid regarding how to access the well. CR 54, Exh. D, 84:2-6 and 128:15-21. Instead, 4N Trucking directed her to access the well crossing by using the walkway. CR 54, Exh. D 13-25.

IV. STANDARD OF REVIEW

The standard of review of an appeal from summary judgment is de novo. *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d

285. The Montana Supreme Court applies the same evaluation as the trial court under Rule 56, M.R.Civ.P. *Id.* The moving party must establish both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.,* citing *Gonzales v. Walchuk*, 2002 MT 262, ¶ 9, 312 Mont. 240, 59 P.3d 377. Once the moving party has met its burden, the opposing party must, in order to raise a genuine issue of material fact, present substantial evidence essential to one or more elements of its case rather than mere conclusory or speculative statements. *Id.* In addition, the standard of review of a question of law is whether the trial court's legal conclusions are correct. *Id.*

V. SUMMARY OF ARGUMENT

The rule in Montana is that an owner, employer, or general contractor has no independent duty to employees of an independent contractor and the workers compensation exclusion is the employee's sole remedy for damages sustained as an employee. There are three exceptions to this general rule where the general contractor negligently exercises retained control over a subcontractor's work; where the activity is inherently dangerous; or where there is a non-delegable duty based upon contract.

First, the district court correctly determined that this owner-independent contractor liability analysis was controlling, and that a separate analysis under a

premises liability theory was unnecessary. For the purposes of premises liability claims brought by a subcontractor employee against an owner in a construction type setting, Montana courts have required an element of retained control over the subcontractor and employee's work methods in order to find any duty of care. Thus, a determination that there is no duty under the owner-independent contractor liability analysis would also result in a finding of no duty under a premises liability theory.

Second, the district court considered the three exceptions to the owner-independent contractor liability rule, and correctly determined that none of the three exceptions applied and that American Colloid owed no legal duty of care to Stokke. Under the first exception, American Colloid did not retain control over the methods 4N Trucking or its employees utilized in the performance of their duties. Under the second exception, Stokke, who was responsible for road maintenance, was not engaged in any inherently dangerous activity. Under the third exception, the contract between American Colloid and 4N Trucking did not establish any non-delegable duty, and 4N Trucking retained all responsibility and obligation for the safety of its own employees. Because none of the exceptions to the general rule are applicable in this case, the district court correctly granted summary judgment in favor of American Colloid.

VI. ARGUMENT

A. The District Court Correctly Applied the Owner-Independent Contractor Liability Rule Instead Of A Premises Liability Theory

The district court's summary judgment order correctly found that "the general rule of owner-independent contractor liability set forth in *Fabich*, *Cunnington*, and *Beckman*, as well as the exceptions to the rule, constitute the applicable standard to apply to this case." CR 72 at 5. The district court did not expressly hold that the theories of owner-independent contractor liability and premises liability were mutually exclusive, but rather using the framework of the owner-independent contractor liability analysis the district court correctly determined that because "American Colloid does not owe Stokke a legal duty of care, the Court need not address American Colloid's separate summary judgment motion with respect to evidence of liability under a premises liability theory." CR 72 at 12.

Stokke's argument that the two theories of liability impose two different standards of care for what are both negligence claims, and that both standards must be applied to this case, is simply not correct. In fact, over the years the owner-independent contractor liability duty of care has been subsumed into the premises liability duty of care when applied in cases where the premises liability is

alleged against a general contractor/owner by the employee of a subcontractor. Because the duty of care for both theories of liability is essentially the same, the district court properly determined there was no duty owed to Stokke by American Colloid in this case, and that an independent analysis under a premises liability theory was not necessary. Additionally, because this *is* a construction type of case and Stokke's allegations arise from her employer's method of performance under a contract for construction type services, application of the owner-independent contractor liability rule is appropriate, and application of premises liability law is not.

1. Conflation of the standards for claims made by employees of subcontractors against owners and general contractors

This Court has articulated the duty attaching to the possessor of a premises as the "duty to use ordinary care in maintaining the premises in a reasonably safe condition and to warn of any hidden or lurking dangers . . . The possessor of the premises is not liable to persons foreseeably upon the premises for physical harm caused to them by any activity or condition on the premises whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Richardson v. Corvallis Public School Dist. No. 1*, 286 Mont. 309, 321, 950 P.2d 748, 755-56 (1997).

This standard is based on the Court's adoption of the Restatement (Second) of Torts § 343A(1), which provides that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *See Kronen v. Richter*, 211 Mont. 208, 683 P.2d 1315, 1317 (1984). Though this Court later held that the status of the injured party as an invitee, licensee, or trespasser does not affect a property owner's general duty of care, it has retained the rest of the Restatement § 343A(1) for premises liability analyses. *Richardson* at 317-18, 920 P.2d at 753-54

The Court has also adopted a common law rule holding that employers are generally not liable for the torts of their independent contractors or subcontractors. Restatement (Second) of Torts § 409 (1965); *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶ 12, 299 Mont. 389, 1 P.3d 348 (citing *Umbs v. Sherrodd, Inc.*, 246 Mont. 373, 376, 805 P.2d 519, 520 (1991); *Shannon v. Howard S. Wright Constr. Co.*, 181 Mont. 269, 275, 593 P.2d 438, 441 (1979)). Three exceptions to this general rule arise if: (1) the general contractor negligently exercises control reserved over a subcontractor's work; (2) the activity is inherently or intrinsically dangerous; or (3) there is a non-delegable duty based on a contract. *Beckman*, ¶ 12.

Under the first "retained control" exception, the Court has relied on the Restatement (Second) of Torts § 414 to establish that "[o]ne who entrusts work to an independent contractor, but who retains the control over any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by [the employer's] failure to exercise [its] control with reasonable care." *Id.*, ¶ 32.

While these two theories of liability both have independent elements and analysis, for the purposes of determining the liability of owners and general contractors in claims made by employees of subcontractors, the elements have been combined. *See Shannon v. Howard S. Wright Const. Co.*, 181 Mont. 269, 593 P.2d 438 (1979). In *Shannon*, the plaintiff was a plumber employed by a company who had subcontracted to perform plumbing and mechanical work at a resort. *Id.* at 271, 593 P.2d at 439. The plaintiff was injured when he fell while climbing a ladder to access the upper floor of a partially-constructed condominium. *Id.* The plaintiff had no control over the manner in which he was to access the upper floor, and his employer had previously made several requests to the owner and general contractor to build temporary stairs for access to the second floor of the condominium. *Id.* at 274, 593 P.2d at 441. Testimony revealed that despite requests, the owner and general contractor were focused on

rushing completion of other portions of the project and that the plaintiff had no option but to continue using the makeshift access. *Id.*

The Court considered whether the plaintiff's contributory negligence barred recovery, and also, whether the owner and general contractor owed a duty of care to the plaintiff. In considering these issues, the Court ultimately conflated the premises liability and owner-independent contractor liability analysis. In determining that the plaintiff's contributory negligence did not bar any recovery, the Court relied on the Restatement (Second) of Torts § 343A, which provides that "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* at 272, 593 P.2d at 440. The Court looked at what it meant to be a "possessor" and focused not just on ownership and control of the land, but on control over the manner in which work was performed. *Id.* at 274, 593 P.2d at 441.

The Court found that the plaintiff's contributory negligence did not bar recovery under a premises liability analysis because the plaintiff "had no control over the manner in which access to the upper floor" was provided, and that the owner and general contractor were responsible for the decision not to provide

stairs. *Id.* Thus, the Court inserted into the premises liability analysis, at least for the purposes of determining comparative liability of owners and general contractors in claims made by employees of subcontractors, an additional control element. Under *Shannon*, an owner and general contractor may be subject to premises liability for accidents occurring during the construction process only if it both possessed the property and *retained control over the subcontractor's methods of performance* within the meaning of the "retained control" doctrine.

The owner-independent contractor liability theory permits negligence claims against owners and general contractors in claims made by employees of subcontractors if certain requirements, such as retained control or inherently dangerous activities, are present. The premises liability analysis under *Shannon* is simply duplicative of the owner-independent contractor liability analysis as it also requires the plaintiff to prove retained control. This is particularly important because its suggests that the only factual situation in which a landowner and general contractor may *only* be subject to premises liability for injuries to a subcontractor's employee if the accident was wholly unrelated to the employee's work.

The owner-independent contractor liability theory and premises liability theory are not necessarily mutually exclusive. Rather, as the district court found,

the theories when applied to claims made by employees of subcontractors against owners and general contractors include the same duty requirements, and therefore a finding of no duty of care under an owner-independent contractor liability analysis precludes a duty finding under a separate premises liability analysis.

2. This is a construction site case

Stokke argues that the premises liability analysis applies, rather than the owner-independent contractor liability analysis, because this is not a construction industry case. Stokke's argument is based on an inaccurate and very narrow reading of *Steichen*. The *Steichen* case does hold that "[i]ndependent contractor status is relevant in construction industry cases, but not in ordinary premises liability cases." *Steichen v. Talcott Properties, LLC*, 2013 MT 2, ¶ 13, 368 Mont. 169, 292 P.3d 458. This is not an ordinary premises liability case though, it is a case that is highly analogous to strict construction industry cases and implicates an independent contractor analysis.

In *Steichen*, defendant Talcott owned a building and leased space in the building to Bresnan Communications. *Id.*, ¶ 3. The plaintiff worked as an independent contractor for Bresnan, providing office cleaning services several nights a week. *Id.* The plaintiff was injured when he slipped and fell in water on the restroom floor during his cleaning duties for Bresnan. *Id.* In holding that the

rules and exceptions regarding general contractor liability did not apply, this Court explained that "[t]here was no construction project" and that "Talcott was not in any sense a general contractor." *Id.*, ¶ 15.

Steichen characterized construction projects as having "layers of involvement with the project owner, the general contractor, subcontractors, independent contractors and employees of each of them." *Id.*, ¶ 14. This perfectly describes the series of complex relationships in the present case. Much like a construction project, American Colloid contracted with various subcontractors to perform specific tasks which allowed it to produce and sell bentonite on the open market. It contracted with GK Construction to perform the actual bentonite mining, including stripping and storage of soils, mining, loading, and reclamation. CR 1 at ¶ 13. It contracted with Stokke's former employer, 4N Trucking, to haul bentonite from the mine to the American Colloid plant located some distance away from the physical mining of bentonite, and to provide road maintenance for the haul roads leading to and from the mine. CR 56 at Ex. A, 1-2. American Colloid was both owner and general contractor. 4N Trucking was a subcontractor. Stokke was an employee of 4N trucking, whose duties included watering roads to keep down dust. CR 56 at Exh. A, 1-2; Exh. B, 83:11-84:1.

In *Steichen*, the contract at issue was simply a lease for office space in a

commercial building, and the lessee's independent contractor provided regular cleaning services. In the present case, the contract at issue provides for the loading and transportation of products and the provision of road maintenance services using heavy machinery such as "front-end loaders, semi-tractors and trailers, road watering support vehicles, and road maintenance patrols." CR 56 at Exh. A, 1. Stokke was required to wear a hard hat, steel toed boots, and a reflective vest when on the job site. CR 54 at Exh. D, 127:16-128:3. Because the present case essentially *is* a construction site case, though the construction Stokke engaged in was in the furtherance of mining operations, the district court properly analyzed the duty questions using the owner-independent contractor liability analysis, rather than the premises liability analysis.

In *Steichen*, the owner-independent contractor liability analysis was not appropriate because it was not a construction industry case and construction industry standards did not apply. A premises liability analysis should have been applied instead. In the present case, construction industry standards *do* apply, and therefore the owner-independent contractor liability analysis should be utilized instead of premises liability. This is particularly true given that, as outlined above, because it is a construction industry type of case, the premises liability analysis would be entirely duplicative of the owner-independent contractor liability

analysis.

3. The factual basis of Stokke's claims does not implicate premises liability

Stokke's argument that application of only the owner-independent contractor liability rule, and not premises liability, would allow landowners to "entirely skirt their duties to a class of people on their land" is entirely without merit. A defendant cannot "skirt" a duty that does not exist. Given the factual nature of Stokke's claims, the owner-independent contractor liability rule determines whether a duty exists in her case, and under *Shannon* the application of a premises liability analysis would not change the outcome in anyway.

Premises liability cases arise out of a pre-existing latent defect in the structure or the land, and not from the manner in which work was performed. *See e.g. Richardson*, 286 Mont. 309, 950 P.2d 748 (plaintiff was injured walking over snow covered grass); *Steichen*, 2013 MT 2 (plaintiff was injured stepping on water in bathroom caused by leaky plumbing). In contrast, the owner-independent contractor liability rule and in particular its retained control doctrine applies primarily to a hazardous method of performance under a construction contract. *See e.g. Beckman*, 2000 MT 112 (plaintiff was injured when trench collapsed while plaintiff was connecting pipe fittings in trench); *Fabich v. PPL Mont., LLC*,

2007 MT 258, 339 Mont. 289, 170 P.3d 943 (plaintiff was injured when he climbed scaffolding covered with slippery grit from sandblasting); *Cunnington v. Gaub*, 2007 MT 12, 335 Mont. 296, 153 P.3d 1 (plaintiff was injured when he fell off step ladder that had been placed on makeshift scaffolding).

Stokke alleges that her injury was caused when she was accessing a water well. In particular, she alleges that to load her water truck, she had to cross over a drainage by walking on "five or six 2" x 4" pieces of lumber approximately 8 feet long that were not connected together in any fashion." CR 1 at ¶ 19. She claims one of the boards twisted and she fell, and that American Colloid thereby "failed to provide a safe work environment." CR 1 at ¶¶ 19, 21. These allegations do not allege a latent defect with the condition of a building structure or land. They do not allege any hidden or lurking dangers. Rather, they are allegations that in furtherance of the performance of her employer's contract with American Colloid, she was required to perform her work in a hazardous fashion that caused her injury. Stokke's claims implicate not the condition of the land owned by American Colloid, but rather the method of performance pursuant to a contract for labor and services between her employer and American Colloid. Such claims are a collateral negligence to which premises liability law does not apply. Accordingly, the district court did not err in applying owner-independent contractor liability and

in declining to apply any separate premises liability analysis.

B. The District Court Properly Applied the Owner-Independent Contractor Doctrine In Concluding That American Colloid Did Not Owe Stokke A Legal Duty Of Care.

Montana law establishes that "[a]s a general rule, an owner, employer or general contractor . . . does not have a duty to prevent injuries to an independent contractor's employees." *Fabich*, ¶ 24 (citing *Cunnington*, ¶ 13). Three exceptions to this general rule arise where: (1) the general contractor negligently exercises control reserved over a subcontractor's work; (2) the activity is inherently or intrinsically dangerous; or (3) there is a non-delegable duty based on a contract. *Beckman*, ¶ 12. In applying the general rule and considering each of these three exceptions, the district court correctly held that none of the exceptions applied in this case, and that American Colloid did not have a legal duty of care and that Stokke's negligence and *respondeat superior* claims against American Colloid failed as a matter of law. CR 72 at 11.

1. Construction and road maintenance related activities, and in particular driving water trucks, are not inherently dangerous

Under the inherently dangerous activity exception to the general rule of non-liability, owners or general contractors may be vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce

unreasonable risks associated with engaging in the inherently dangerous activity. *Beckman*, ¶ 24. The determination of whether an activity is inherently dangerous is an issue of law, not of fact, and the district court correctly found that Stokke was not engaged in an inherently dangerous activity and that the exception does not apply. *Fabich*, ¶ 32.

A general contractor will not be liable for every tort committed by a subcontractor who is engaged in an inherently dangerous or hazardous activity. *Beckman*, ¶ 22. Rather, an general contractor is vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce the unreasonable risks associated with engaging in an inherently dangerous activity. *Id.*, ¶¶ 22, 24. An inherently dangerous activity "is one, like large-scale trenching, that requires 'special precautions' to prevent injury or death." *Cunnington*, ¶ 16.

In determining whether a general contractor should be held liable for the torts of subcontractors arising out of work that is inherently dangerous, this Court has relied on the application of the Restatement (Second) of Torts for guidance. *Beckman*, ¶ 15. The Restatement provides:

> § 416. Work Dangerous in Absence of Special Precautions
> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to

exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§ 427. Negligence as to Danger Inherent in Work
One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

These two rules are considered together. *Beckman*, ¶ 15 (citing Restatement (Second) of Torts § 416 cmt. a.) In applying the Restatement, this Court has cautioned as follows:

> This is not to say that every activity on a construction site which may result in death or serious bodily injury is inherently dangerous for purposes of our analysis under the Restatement. Much of the activity that occurs on a construction site, although potentially dangerous, is quite safe when simple, easy to follow safety precautions are taken.

Id., ¶ 25.

The district court properly relied on *Fabich* in applying these rules to the present case. CR 72 at 9. In *Fabich*, the plaintiff was working on a power plant relining a scrubber vessel when he slipped on an accumulation of slippery grit on the scaffolding caused by sandblasting, and fell off the scaffolding. *Fabich*, ¶¶ 7, 33. This Court determined the particular construction activity he was engaged in was not inherently dangerous, because slippery material underfoot is a hazard

which ordinarily may be encountered at work sites and does not call for particular precautions other than standard cleaning measures. *Id.*, ¶ 37.

Plainly there are activities on construction sites, and mining sites, which may result in death or serious bodily injury, but that does not mean the activity the plaintiff was engaged in is inherently dangerous. Taken together, *Beckman* and *Fabich* instruct that Court to consider whether the risk of death or serious injury can be avoided through the proper use of specialized, rather than general, safety precautions. Where the hazard alleged is one which "ordinarily may be encountered" and which "does not call for particular precautions," it is not an inherently or intrinsically dangerous activity. *Fabich*, ¶ 37.

The district court correctly found that there was no evidence in the record to support Stokke's contention that the water hauling and dispersal she was engaged in are inherently dangerous. CR 72 at 10. Stokke argues that the district court took too narrow a view of Stokke's job, and suggests that she was engaged in "mining." There is no dispute that some aspects of mining are inherently dangerous. However, Stokke was not "mining". She was employed to drive a water truck and disperse water, and was injured while engaged in those activities. That she was driving a water truck to assist with a mining operation does not mean her road construction and maintenance constitute "mining."

Walking across the platform to the water well did not create a peculiar or unreasonable risk of harm to Stokke which would require special precautions to be implemented by American Colloid. Stokke herself acknowledges that the work she engaged in did not require any specialized safety precaution. CR 54, Exh. D, 127:14-17 and 135:7-9. The ditch she was crossing when she was injured was such that, if she chose to, Stokke could simply step or wade across it without any danger aside from wet feet. CR 54, Exh. A, 18:3-10. Stokke testified that she was tasked with driving a water truck at 4N Trucking, and with watering the roads. CR 56, Exh. B, 83:11-84:1. None of the activities that comprised her position constitute "mining," and none required special precautions which would indicate they were "inherently dangerous."

Stokke relies on two cases, *Paull* and *Cobos*, to suggest that she was engaged in an inherently dangerous activity. It is unclear why Stokke relies so heavily on *Paull,* as the case actually supports American Colloid's position. In *Paull*, this Court found that transporting prisoners is an inherently dangerous activity. *Paull v. Park County*, 2009 MT 321, ¶ 30, 352 Mont. 465, 218 P.3d 1198. The Court explained that transporting prisoners was different than "ordinary driving" because of the unique risks posed not only to transport employees and prisoners, but also to the public at large. *Id.*, ¶ 23. The Court

noted transported prisoners are often charged with or convicted of serious criminal offenses, that there is always a risk of escape, that food and restroom breaks are potentially dangerous events, and that the prisoners refined and constrained in squalid and painful conditions are likely to become aggressive and hostile. *Id.*, ¶¶ 23-25. The Court also reiterated that "a contractor is not liable for every tort by an independent subcontractor engaged in inherently dangerous work, but only those torts which arise from risks caused by engaging in such dangerous activity." *Id.*, ¶ 30.

Though one of Stokke's primary duties was driving, she was not driving convicted felons. She was driving a water truck. She was injured by crossing a walkway from a well used to fill her water truck. While mining certainly poses significant risks and American Colloid does operate a bentonite mine, Stokke's injury did not arise from the risks inherent in mining and was not caused by engaging in such dangerous activities. Accordingly, under the clear holding of *Paull*, Stokke does not satisfy the inherently dangerous activity exception to the general rule that general contractors are not liable to the employees of their subcontractors.

The Montana Federal District Court case that Stokke relies on, *Cobos*, is likewise not helpful to her argument. In *Cobos*, the federal district court held that

mining was an inherently dangerous activity constituting an exception to the general rule that contractors are not liable to the employees of their subcontractors. *Cobos v. Stillwater Mine, Co.*, 2012 WL 6018147, *6 (Dec. 3, 2012). However, the court reached this conclusion by looking at the specific activities engaged in by the plaintiff. In *Cobos*, the plaintiff was employed as an underground miner for a palladium and platinum mining company. *Id.* at *1. His job included drilling holes into a cave face, loading them with explosives, detonating the explosives, and then mucking out the broken rock once the blast smoke had cleared. *Id.* That the inhalation of particles that caused injury to the plaintiff could have been avoided through standard safety precautions was not dispositive, because "the determination of inherent danger should not rest only on the difficulty of the safety measures, but also on the nature of the activity itself." *Id.* at *6 (quoting *Chambers v. City of Helena*, 2002 MT 142, 310 Mont. 241, 49 P.3d 587 (overruled on other grounds)).

Stokke was not an underground miner. She was not engaged in drilling, blasting, or clearing debris. Though her work driving a water truck was in furtherance of and for the benefit of a bentonite mine, she herself was not engaged in mining. As the *Cobos* court instructs, looking at "the nature of the activity itself" is what controls, and the nature of Stokke's employment was driving a

water truck and watering dusty roads. This simply does not constitute an inherently dangerous activity.

Rather than the cases relied on by Stokke, the present case is on par with this Court's holding in *Fabich*, acknowledging that "slippery material underfoot. . . is a hazard which ordinarily may be encountered at work sites and which does not call for particular precautions." *Fabich*, ¶ 37. As the district court noted in its summary judgment order, Stokke's activity of accessing the water well, like many activities on a construction site, is quite safe when simple safety precautions are taken. CR 72 at 10. It does not require any special precautions and cannot be described or categorized as inherently dangerous.

American Colloid cannot be held liable for the injuries sustained by Stokke under the inherently dangerous exception of the *Beckman* factors because the activity is not inherently dangerous. Stokke was not mining, she was engaged in road maintenance via driving a water truck and watering dusty roads. The job she was hired to do is not inherently dangerous, and walking across a walkway she had proceeded across hundreds of times before is also not inherently dangerous. The district court correctly found that the inherently dangerous activity exception does not apply to this case.

2. American Colloid did not retain control over 4N Trucking

The "retained control" exception to the general rule that general contractors are not liable to the employees of their subcontractors provides that a defendant may owe a duty to third parties injured by an independent contractor's act where the defendant negligently exercises control reserved over the independent contractor's work. *Beckman*, ¶ 31. To determine whether a general contractor has retained control, the courts look to "whether the [defendant] retained authority to direct the manner in which the work was performed and knew or should have known that the independent contractor was performing work in an unreasonably dangerous manner." *Fabich*, ¶ 25 (citing *Beckman*, ¶ 33). The district court correctly found that American Colloid did not retain any control over 4N Trucking, and therefore that Stokke could not establish any duty was owed to her by American Colloid.

This Court has previously looked to the Restatement for guidance on the issue of retained control, and has adopted the following standard:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Beckman, ¶ 32 (citing Restatement (Second) of Torts § 414 (1965)). This Court

has also relied upon comment b to this provision, which provides:

> The rule stated in this section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but ... superintends the entire job. In such a situation, the principal contractor is subject to liability if it fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if [it] knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which [the employer] has retained ....

Beckman, ¶ 33. Comment c to the Restatement § 414 further explains:

> In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. **It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers,** but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

This Court has had numerous opportunities to apply the retained control exception, and clear patterns have emerged over the years. In *Shannon*, this Court found evidence of retained control where the owner demanded that work at another section of the project proceed first, and therefore refused to allow stairs to be built until certain pipes were in place, actions which led to the use of an unsecured ladder on which plaintiff was injured. *Shannon*, 181 Mont. at 277–79. The owner also instructed the subcontractor to proceed with the work on the

second floor, even though the stairs were not in place, because the condos were already sold and purchasers had been promised completion dates. *Id.* at 278. Thus the evidence showed that the owner had more than "a general right to inspect the work of the subcontractor. Specifically it show[ed] that [the owner]... could and did exercise control over" how the employees reached the upper levels of the condos. Thus, "[t]he extra hazards created by the need to use extension ladders [could] be attributed directly to ... [the owner]." *Id.* at 279.

In *Umbs*, the plaintiff's truck had a leak in the brake system, and the inspector prohibited further movement of the truck until the brakes were repaired. *Umbs v. Sherrodd, Inc.*, 246 Mont. 373, 374, 805 P.2d 519 (1991). The president of the company which had leased the truck to the plaintiff's employer ordered the plaintiff to make a delivery despite anyways. *Id.* 374–375. The Plaintiff was subsequently injured when the brakes on the truck failed on a downhill grade approaching a railroad crossing, and the vehicle was hit by a train. *Id.* Because the general contractor, knowing that the truck's brakes were failing, ordered plaintiff to deliver the load anyways, evidence indicated the general contractor exercised direct control over the plaintiff sufficient evidence to defeat summary judgment under the retained control exception. *Id.* at 377.

In *Beckman*, the defendant county retained an independent contractor to

extend city water lines. Beckman, an employee of the independent contractor, was injured when a trench in which he was working collapsed. *Beckman*, ¶ 10. As evidence of retained control sufficient to overcome summary judgment, this Court noted that contract documents between the county and the independent contractor provided that "materials and methods of construction ... shall conform to the requirements of Butte–Silver Bow," and that the county retained responsibility to furnish a construction expert "for monitoring all construction work." *Id.*, ¶ 38.

In *Cunnington*, the plaintiff was injured when he fell off a makeshift scaffolding and into a window pit. *Cunnington*, ¶¶ 7–8. As evidence of retained control, this Court found that the general contractor was in charge of backfilling the area surrounding the accident site, including the window pit which the plaintiff fell into. *Id.*, ¶ 24. The subcontractor had asked the general contractor on multiple occassions to backfill around the windows so he could complete the siding. *Id.* Because the general contractor was aware that the area around the window pits needed backfilling but put it off to finish other projects first, the subcontractor was forced to perform its work in a particular way, i.e. by use of makeshift scaffolding over an unfinished window well instead of standard scaffolding on a flat surface. *Id.*, ¶ 26. Because the general contractor's actions or inactions caused the use of the makeshift scaffolding on which the plaintiff was injured, this Court found the

general contractor retained sufficient control over the work to subject himself to liability. *Id.*, ¶ 27.

Each of these cases finding retained control share a general factual thread, namely that the owner or general contractor did or did not do something which expressly directed or affected the manner in which the subcontractor and its employees performed the work related to the accident. On the other hand, this Court has found that in the absence of such direction or effect on the manner of performance, there is no retained control. In *Fabich*, an employee was injured after falling several feet from scaffolding while working inside a scrubber vessel. *Fabich*, ¶ 7. The plaintiff attempted to establish the general contractor owed him a duty under the retained control exception by arguing that a "safety man" hired by the general contractor was present each day of the job and was at the safety meetings once a week, that the general contractor was in a rush to complete the job of relining the scrubber, that the general contractor had the power to monitor safety and stop the job or make changes for safety reasons, and that the general contractor issued safety compliance memos in the form of a "clean-shaven" policy and a footwear safety-toe policy which applied to him as well as his own workers. *Fabich*, ¶ 23. This Court rejected these arguments and held that, to the extent Fabich's statements are supported by the record, they failed to bring this case

within the retained control exception to the general rule. *Id.*, ¶ 31. This Court found that the plaintiff's testimony established "that he received no instructions or direction from [the general contractor's] staff." *Id.* ¶ 29.

The district court properly analogized Stokke's case to *Fabich*, and found that American Colloid did not retain control. Unlike the cases where the Montana Supreme Court has found a clear retention of control, in Stokke's case there is no evidence even suggesting that American Colloid retained any authority to direct the manner in which 4N Trucking performed its work. Though American Colloid may have been able to make suggestions, it did not control the operative details of 4N Trucking's work. *See* Restatement (Second) of Torts § 414, cmt. c (noting that it is not enough that a principal "has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations").

Unlike the cases referenced *supra*, American Colloid did not in any way direct the manner in which 4N Trucking performed its work. This aspect of the record is clearly articulated by Stokke's employer, 4N Trucking (through Kim Newlin, manager):

Q. (BY MR. McFARLAND): All right. In your 12-, 13-, 14-year

relationship with American Colloid, did you ever believe that they had control over how you decided to access that well?

. . .

THE DEPONENT: No.

BY MR. McFARLAND:·· Yep. Outside of just the general directive to comply with general safety -- safety standards, did American Colloid in any way control the safety aspects or have control over the safety aspects of your business?

. . .

THE DEPONENT: I think if they saw something that was really -- needed to be addressed, they'd let me know; but, other than that, no.

Q.(BY MR. SIMPSON): There is nothing specified in any of your contracts with Colloid directing you where you are supposed to obtain water to spread on the roads; is that right?

A. Yes.

CR 54 at Exh. A, 26:9-15; 38:6-15; 98:11-15. Specifically regarding access to the well used by Stokke, 4N Trucking's representative elaborated as follows:

A. As long as the dust was under control, he never did say anything about the water.
Q. Okay. And outside of the one conversation that we talked about earlier or that you talked about with Mr. Simpson earlier, do you recall anyone from American Colloid ever asking you to put water in any specific area?
A. Well, they just required that I keep the dust down where I was hauling from, but I can't think of any.
Q. Okay. **Did Jason Schneider or anyone from American Colloid ever direct you as to which well to use?**
A. **Not that I can remember.**
Q. Did they ever direct you on how to access the well in question in this case?
A. No.

Q. Did anyone from American Colloid ever provide supervision of you or your employees in the manner in which they filled their water trucks?
A. Not that I remember or that I'm aware of.
Q. Do you recall anyone from American Colloid in the area of the well or standing at the well watching someone fill up their water truck or watching you fill up your water truck?
A. I don't remember of any.

CR 66 at Exh. A, 100:11-101:7. [Emphasis added.]

4N Trucking ran its day-to-day operations, determined the work that was performed by its employees and dictated the terms in which they were to perform it. CR 54 at Exh. A, 24:14-20, 100:13-24, 26:9-21, 98:11-15, 75:11-18, and 98:22-99:10. Stokke herself admitted that she received no instruction or direction, directly or indirectly, from American Colloid:

Q. Did anyone from American Colloid, at any point in time, give you any instruction on how to access the well?
A. No.
Q. Were you trained by anyone from American Colloid on how to access the well?
A. No.
Q. You were not hired by American Colloid; correct?
A. No, I was not.
Q. You didn't interview with anyone from American Colloid?
A. No, I did not.
Q. Did you remember talking with anyone from American Colloid while you were performing your job for 4N Trucking at the mine site at all?
A. I don't believe I did.
Q. So in your approximate eight or nine months on the job, you never talked to anyone from American Colloid, that you know of?
A. Not that I know of.

CR 54 at Exh. D, 134: 1-18.

A mere general right possessed by the employer to exert control is insufficient to establish the retention of control, and the terms in the contract between American Colloid and 4N Trucking cited by Stokke simply do not establish retained control. This is particularly true given that the contract includes the following express provisions:

> The parties acknowledge and agree that 4N is responsible for the performance of all work undertaken and for the accomplishment of the desired result, and ACC shall have no control over the method and means of such accomplishment, except that 4N shall observe all of the rules and regulations required by ACC at the plant or mining sites and shall use due care and diligence to protect the product and prevent any damage to the property of ACC.
>
> . . .
>
> The drivers of the semi-tractors and all operations of the semi-tractors by said drivers, shall be under the sole possession, responsibility, control, and direction of 4N.

CR 56 at Exh. A, 5-6. American Colloid did not retain any authority over 4N Trucking, other than the general right as an owner, and this is not sufficient to establish retained control.

Not only did American Colloid not direct Stokke's work, it had no knowledge or reason to know that 4N Trucking may have been performing work in an unreasonably dangerous manner. There also is no evidence that the work performed by 4N Trucking was performed in an unreasonably dangerous manner

or, if it was, that American Colloid knew or should have known about it. To the contrary, Stokke testified she had walked across the walkway somewhere between a hundred and a thousand times prior to her fall. CR 54 at Exh. D, 114:21-24 and 128:4-8. In the twelve plus years 4N Trucking had worked at the site, no one had been injured while accessing the well. CR 54 at Exh. A, 44:13-23; 45:2-17, Exh. A; CR 54 at Exh. D, 127:8-13, Exh. D. There is simply nothing about the type of work 4N Trucking was performing which would put American Colloid on notice that the work performed was done in an unreasonably dangerous manner and, in fact, it was not. The district court correctly found that there is no evidence to support the application of the retained control exception to this case. CR 72 at 8.

3. American Colloid did not have a non-delegable duty

Under the final exception established in *Beckman,* a general contractor may be liable to the employees of their subcontractors if the general contractually obligated itself to ensure safety. *Beckman*, ¶ 31 (citing *Stepanek v. Kober Constr.*, 191 Mont. 430, 625 P.2d 51 (1981)). Liability may be based on a non-delegable duty of the owner *only* when a contractual provision establishes that the owner has assumed responsibility for initiating, maintaining and supervising safety precautions. *Fabich*, ¶ 39. Where the defendant has not contractually accepted the responsibility for the safety of others, the general rule of 'no duty' attaches.

Grover v. Cornerstone Constr. N.W. Inc., 2004 MT 148, ¶ 20, 321 Mont. 477, 91 P.3d 1278. Using this framework, the district court correctly found that based upon the American Colloid contract with 4N Trucking, that American Colloid did not have a non-delegable duty to Stokke.

Stokke argues that the district court ignored the testimony of her expert, Jack Spadero, who generally cites to the Mining Safety and Health Administration ("MSHA") regulations, and her analysis of the *Gibby* case in determining that there was no non-delegable duty. However, her arguments here have been expressly denied by other courts, and the MSHA regulations alone are not sufficient to create a non-delegable duty.

In *Cobos*, the case relied on so heavily by Stokke for other arguments, the court actually considered this, and determined that the general MSHA regulations do *not* constitute a delegation of safety regulations to an independent contractor. The court explained:

> Plaintiffs also rely on the Mine Safety and Health Administration Program Policy Manual, Volume III, Part 45-1, which states in pertinent part:
>
> MSHA's enforcement policy regarding independent contractors does not change production-operators' basic compliance responsibilities. Production-operators are subject to all provisions of the Act, and to all standards and regulations applicable to their mining operations. This overall compliance responsibility includes assuring compliance by independent contractors with the Act and with applicable standards and regulations. As a

> result, both independent contractors and production-operators are responsible for compliance with all applicable provisions of the Act, standards and regulations. *Id.*

Based on this statutory and policy language, Plaintiffs allege that Defendant, as the operator of the Stillwater mine, cannot delegate safety regulations to an independent contractor, such as Thyssen.

> However, as noted by Defendant, other than citation to the statute and its supporting language, Plaintiffs do not direct the Court to any case law that can support this conclusion. To the contrary, **the existing body of case law recognizes that the Mine Safety and Health Act cannot be a basis to confer a private right of action, contractually or otherwise, to private individuals.** *Price v. Brody Mining, LLC*, 2010 WL 2486343 at 1 (S.D.W.Va. 2010); see also *King v. Island Creek Coal Co.*, 399 F.Supp 2d 735 (W.D.Va. 2004); *Parke v. Bethenergy Mines, Inc.*, 732 F.Supp. 587, 589 (W.D.Pa. 1990).

Cobos, 2012 WL 6018147 at *5. [Emphasis added.]

Even the *Gibby* case relied on by Stokke supports the tenet that the MSHA is not a basis for conferring a private right of action to individuals, and does not create a non-delegable duty. While the *Gibby* Court did approve jury instruction language indicating that the MSHA set forth the non-delegable duties of an operator of a mining operation, it did so only *after* finding that a non-delegable duty was created under the terms of the contract between the mine operator and a subcontractor. *Gibby v. Noranda Minerals Corp.*, 273 Mont. 420, 426, 905 P.2d 126, 130 (1995). The Court found that a contractual grant of authority *established*

"a non-delegable duty of safety to the respondent," and only then found that the MSHA determined precisely *what* those non-delegable safety duties were. *Id.* at 426, 429-30, 905 P.2d 130-131. *Gibby* does hold that failure to discharge MSHA obligations is evidence of negligence, but it simply does not stand for the proposition that the MSHA establishes the existence of a non-delegable duty.

Instead, to determine whether a non-delegable duty exists in the present case, an analysis must begin with the plain language of the contract between American Colloid and 4N Trucking. This contractual language unequivocally disclaims any control by American Colloid over the work of 4N Trucking. It provides:

> The parties acknowledge and agree that 4N is responsible for the performance of all work undertaken and for the accomplishment of the desired result, and ACC shall have no control over the method and means of such accomplishment. . .
>
> The drivers of the semi-tractors and all operations of the semi-tractors by said drivers, shall be under the sole possession, responsibility, control, and direction of 4N.

CR 56, Exh. A at 5-6. Additionally, 4N Trucking procured its own MSHA identification which required it to have its own training plan to train its own employees regarding MSHA regulations and safety. CR 54, Exh. A, 27:11-28:3.

Stokke herself acknowledges she had no contact with anyone from

American Colloid in her nine months on the job. CR 54, Exh. D, 134:15-18. No one from American Colloid supervised Stokke, nor did American Colloid provided her with any safety equipment or safety training regarding the well access. CR 54, Exh. D, 84:2-6, 128:15-21, and 135:18-24. As the district court correctly found, the contract between 4N Trucking and American Colloid clearly establishes that 4N Trucking resumed all responsibility for the work performed by its employees, which included Stokke, and therefore that the non-delegable duty exception under the final *Beckman* factor does not apply to American Colloid. CR 72 at 11.

VII. CONCLUSION

The district court correctly found that the owner-independent contractor liability analysis was controlling and dispositive of all Stokke's claims. The rule that an owner, employer, or general contractor has no independent duty to employees of an independent contractor, and none of the three exceptions to this rule are applicable in Stokke's case. Accordingly, the district court's Order Granting Summary Judgment should be affirmed in its entirety.

///

///

DATED this 30th day of June, 2017.

By: /s/ Dylan McFarland

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that pursuant to Rule 11, Mont. R. App. P., *Appellee American Colloid Company's Answer Brief* is:

X Proportionally-spaced, Times New Roman 14 pt; is double spaced (except that footnotes and quoted and indented materials are single spaced); and the word count calculated with Corel WordPerfect does not exceed 9,833 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service and Appendix.

X Does not exceed 10,000 words pursuant to Rule (4)(a), Mont. R. App. P.

DATED this 30th day of June, 2017.

By: /s/ Dylan McFarland

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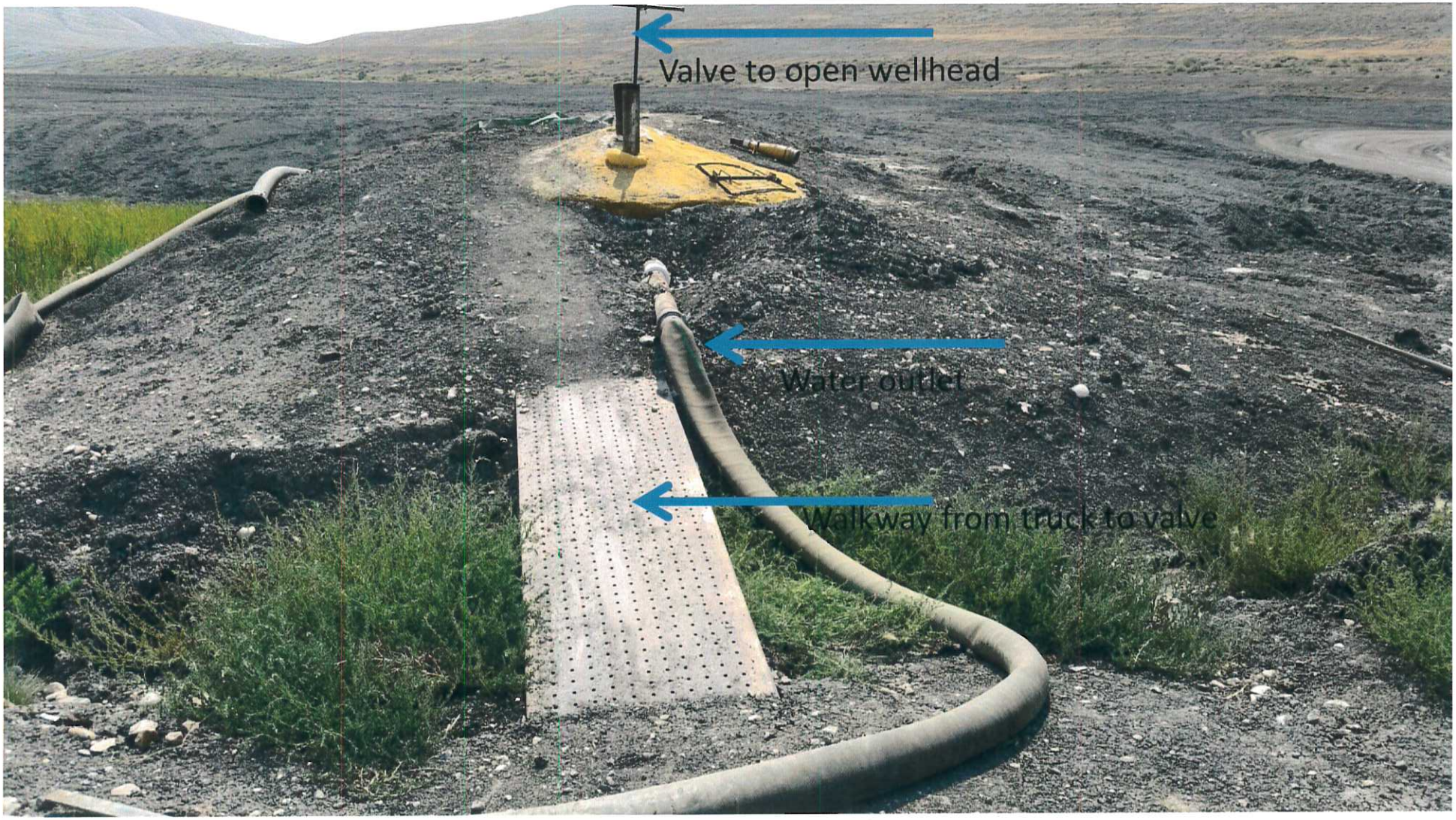
APPENDIX

A. Photographs

EXHIBIT A


Valve to open wellhead
Water outlet
Walkway from truck to valve

ACC-121


ACC-667

CERTIFICATE OF SERVICE

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